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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

ROBERT D. YOUNG

Petitioner

vs.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

JOHN D. FISHER petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

(i)

Questions Presented

1. Whether a mere customer of a racketeering enterprise is criminally liable under 18 U.S.C. Section 1962.

2. Whether joint trial principles of Kotteakos vs. United States, 328 U.S. 750 (1946) are inapplicable to RICO prosecutions.

3. Whether the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1962, authorizes a finding of membership in or association with an illicit enterprise, where the Defendant's only connection with the enterprise or its activities consists of isolated or sporadic acts, without continuity of association or participation.

4. Whether a person engages in a pattern of racketeering activity by participation in a single isolated act or transaction, if it is possible to institute two or more criminal charges against him resulting from that act or transaction.

5. Adoption of Co-Defendant's issues.

List of Parties

Rosario Palermo

William H. Brown

John D. Fisher

Robert D. Young

Joseph Macaluso

Frank Scionti

Sam C. Martino

Paul Guarino

Jimmy Farina

Rolando Gonzalez Rodriguez

Joseph C. Russello

Amalia Morgado

Joseph D. Lazzara

United States of America

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ROBERT D. YOUNG petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals United States vs. Martino, et al is reported at 648 F.2d 367.

JURISDICTION

The opinion of the lower Court was filed on June 19, 1981. (App. A, infra). The judgment of the Court of Appeals has not been rendered because Petitioner procured a stay of mandate until December 10, 1981 (App. B infra.). A petition for rehearing and a petition for rehearing en banc (by adoption) were timely filed on August 1, 1981. (App. C, infra). These petitions were denied on September 17, 1981 (App. D, infra). The jurisdiction of this Court is involved under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

18 U.S.C. Section 1341.

"Section 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false of fraudulent pretense, representations...for the purpose of executing such scheme or artifice or attempting so to do...any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon...shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C Section 1961.

"Section 1961. Definitions.

As used in this chapter -

(1) 'Racketeering activity' means (A) any act or threat involving...arson..., which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under...title 18, United States Code:...section 1341 (relating to mail fraud)...,

(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;..."

18 U.S.C. Section 1962.

"1962. Prohibited activities.

...(c) It shall be unlawful for any person employed by or associated with any enterprise...to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity..."

STATEMENT OF THE CASE

On June 8, 1977, a 35 Count Indictment was filed in District Court, Tampa, Florida charging Petitioner and others with conspiracy, racketeering and mail fraud. Petitioner was charged in Count 1 with conspiracy to conduct and to participate in the conduct of the affairs of en enterprise through a pattern in the racketeering activity (Section 1962(d) of Title 18). Petitioner was charged in Count 2 with racketeering in that he did conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity (Section 1962(c) of Title 18). Petitioner was charged in Counts 34 and 35 (subsequently Counts 32 and 33) with the crime of mail fraud involving a letter which was mailed by an insurance agent to National Union Fire Insurance Company, New York, New York regarding an insurance policy and a letter which was mailed by Lawrence H. Luppens, Jr., attorney to Monarch Adjusting, Inc., Ft. Lauderdale, Florida containing a letter enclosing sworn statements in Proof of Loss.

After trial by jury, Petitioner was found guilty of Count 1 (Conspiracy), Count 2 (Racketeering) and Counts 32 and 33 (Mail Fraud, Armenia Avenue fire).

Petitioner was adjudged guilty on the charge returned under each guilty verdict. On April 14, 1978, Petitioner was sentenced to a 8 year term of imprisonment

on Count 1, an 8 year term of imprisonment on Count 2, and a 5 year term of imprisonment on Counts 32 and 33. These terms of imprisonment were all to run concurrently with each other. Jurisdiction in the trial court was premised upon 18 U.S.C. Section 3231.

From 1972 until mid-1976, the City of Tampa, Florida was plagued with a rash of residential and commercial arsons. Common features suggested that the fires were the work of a single person or of a single group of persons operating together.

Although the origin of the fires was similar in each case, the nature and condition of the burned buildings were not. The structures ranged from abandoned and dilapidated rental houses to a nearly new office and apartment building that was fully occupied and making a healthy profit.

In the investigation by the Tampa Fire Department the name of Willie Noriega began to appear with frequency. He had a history of involvement with fires since 1963 when, at 19, he set fire to his mother's house in Tampa and was arrested by the Tampa Fire Marshal while sitting outside watching the flames. On that occasion he was diagnosed as a paranoid schizophrenic by a psychiatric panel and was committed to a mental hospital for several months.

On several occasions in 1974 and 1975 Noriega was seen by policemen and firefighters at fire scenes. On one occasion a policeman observed him to be in an apparent state of sexual excitement while watching a fire at a large commercial building. The first solid evidence of his involvement in the fires was discovered in November 1975, when a residential fire was extinguished

before serious damage had been done. As a result, Noriega was indicted for arson by the Hillsborough County State's Attorney.

As early as February, 1976, while the state arson charge was pending, Noriega initiated conversations with FBI agents and federal prosecutors that eventually resulted in the indictment in this case. In a series of interviews beginning in June 1976, Noriega told the federal officials that he had personally set scores of residential and commercial fires in Tampa since 1972, alone or in conjunction with others.

On February 26, 1976, subsequent to Noriega's initial contact with law enforcement agents, John D. Fisher purchased a two-story brick apartment and office building, located at 1907-15 North Armenia Avenue, in Tampa, Hillsborough County, Florida for the sum of $17,500 and thereafter spent approximately $25,000 for various improvements to renovate the building. On or before that date, insurance for the building and its contents was obtained. The total amount of coverage of the fire insurance, which was issued by five (5) separate insurance companies policies was $125,000 on the building and $20,000 on the contents contained therein. The value of the building for insurance purposes was determined from 1) a Commercial Fire prepared by Retail Credit report Company on March 19, 1976, which estimated the net worth of the building to be in the neighborhood of $150,000 and 2) an appraisal prepared for I. Arthur Yanoff and Company which estimated the replacement cost of the building to be approximately $176,000. Petitioner's building was subsequently destroyed by fire during the evening of April 13, 1976, as a result of certain acts of arson allegedly committed by Willie Noriega.

At the time of the fire, John D. Fisher had established a branch office of his bail bond business on the first floor of the building.

John D. Fisher reported the arson of his building to his insurance agent, Robert D. Young, who in turn referred the claim to I. Arthur Yanoff and Company.

An insurance adjuster, Thomas P. Willis of Consolidated Claims Service, Inc. of Tampa, Florida, personally examined the fire loss at 1907-15 North Armenia Avenue and viewed the remains of the building and its contents the morning after the fire. Mr. Willis met with John D. Fisher with regard to possible settlement of the insurance claim of John D. Fisher. Subsequently Mr. Willis informed Mr. Young that he preferred to postpone these negotiations inasmuch as Federal Bureau of Investigation and Grand Jury investigations of the Armenia fire were pending.

At no time was any $125,000 claim or portion thereof collected on the Armenia building as found by the jury, as erroneously stated by the Government, and as affirmed by the Court of Appeals (Appendix A, page 78). This is illustrative of the prejudicial confusion and errors arising from the Government's conduct of this complex case.

Also symptomatic of these errors is the headline in the Court's Opinion (p. 53 a of Appendix A), classifying Robert D. Young as one of "The Dissatisfied Owners". This is incorrect. No evidence was presented at trial that Mr. Young was owner of the 1907-1915 North Armenia Avenue property; contra, this property solely was owned by co-petitioner John Fisher. (Vol. 50, p. 315).

Notwithstanding, this single, unrelated episode and Noriega's abandonment of the "enterprise" and "pattern of racketeering activity" while cooperating with law enforcement authorization, the Court held that each count of mail fraud properly could be considered as a separate and distinct act of racketeering, and

thus that a defendant could be found to be a member of Noriega's enterprise, and to have conducted its affairs through a pattern of racketeering activity, even though he was not alleged to have had any other connection with Noriega, or any of his associates, or any other instance of criminal conduct, so long as the mails were used at least twice in processing his insurance claim. 648 F.2d at 402-404.

ARGUMENT

This Court should accept jurisdiction to determine issues of exceptional public importance concerning the meaning and application of the Racketeer Influenced and Corrupt Organizations Act. The wide variety of fact patterns in this case renders it uniquely appropriate for review in that the decision of the Court below conflicts with those of this Court.

In United States v. Turkette, _____ U.S. ____, 101 S. Ct. 2524 (1981), this Court distinguished the "enterprise" from the "pattern of racketeering activity" by which the enterprise is operated. Both terms were defined in an extremely broad manner. As to the scope of the statute the only remaining dispute relates to the activity which an individual must engage in to be criminally liable.

In applying the statute, a person must be "employed by or associated with" the enterprise in order to be criminally liable. Since the term "associated with" is extremely broad, minor or even innocent contact with the enterprise would seem to satisfy the association requirement. Thus, this phrase gives no real guidance in determining what an individual (not the enterprise) must do to violate the statute.

To violate the statute, an individual must "conduct or participate directly or indirectly in the conduct

of such enterprise's affairs". This language is extremely important to the determination of individual liability. It is the construction of this portion of the statute which has generated the confusing and glaring conflict between Circuit Court decisions.

Per United States v. Mandel, 591 F.2d 1347; 1374-1376 (4th Cir. 1979) an individual must be involved in the operation or management of the enterprise's affairs. Thus, Mandel, supra., reaches those associates of the enterprise who function together as a continuing unit with a common purpose. This is consistant with the concept of the enterprise defined in Turkette, supra., at 2528.

In Martino, supra., the Fifth Circuit rejected the contention that mere customers of the enterprise's arson service do not conduct or participate directly or indirectly in the conduct of the enterprise's affairs. Martino, supra., at 382 and 402. The Martino court went further and determined that by committing two predicate crimes related to the affairs of the enterprise, a person participates in the enterprise and thus violates RICO. Martino, supra at 403.

Under Turkette, supra., the enterprise is comprised only of those associates who function as a continuing unit with a common purpose. However, under Martino, supra., a person can violate the statute and yet not be one of the associates who function together as a continuing unit with the requisite common purpose.

This case illustrates the important difference between the Mandel and Martino constructions. Under both Martino, supra., and Mandel, supra., those persons who assist in the management of the enterprise or

who personally assist in carrying out the acts of racketeering activity can legitimately be considered a part of the enterprise's structure. Such persons operate the enterprise, have a common purpose and should be knowledgeable enough about the activities of the enterprise to appreciate the additional risks involved. However, under Mandel, supra., mere customers would not be subject to prosecution under 18 U.S.C. Section 1962; but would, of course, be subject to prosecution for underlying acts.

Under Martino, supra., persons who are mere customers associated only with isolated or sporadic acts without continuity of association or participation are subject to prosecution under both 18 U.S.C. Section 1962 and under the statutes proscribing the underlying acts of racketeering activity. Thus, customers who do not function as part of a continuing unit with another and who share no common purpose with each other are tried "in mass" with each other and with those who manage, control or operate the enterprise. The guilt or innocence of such customers simply cannot be reliably determined alternatively with respect to the RICO application or the underlying isolated acts.

The term "conduct" referred to in both 18 U.S.C. Section 1511 and 18 U.S.C. Section 1955. In reviewing these sections, the Fifth Circuit has recognized that "conduct" refers to those who participate in the operation of the entity, but does not include customers. United States v. Marrifield, 515 F. 2d 877; 880-881 (5th Cir. 1975). If basic principles of due process are to be adhered "conduct" must be permitted to describe drastically differing applications when used in similar context within a single piece of legislation.

The focus of RICO is on continuing conduct. The prosecution is required to show a defendant's membership

in the alleged enterprise and his conduct of its affairs through a pattern of racketeering activity. "Pattern of racketeering activity" is not defined in terms of offenses; it is defined in terms of conduct, of acts, and then only in terms of the bare minimum that, under any circumstances, may be found to be a pattern. A pattern "requires at least two acts of racketeering activity...," 18 U.S.C. Section 1961(5), but two separate predicate acts are not necessarily enough to constitute a pattern. Multiple mail fraud counts arising from a single episode do not constitute the two acts to form the requisite pattern.

In Turkette this Court did not consider the question of the application of RICO to a single episode. Novia Turkette the heart, soul and brains of the enterprise, was the sole defendant. Turkette headed an enterprise that specialized in robbing pharmacies and also engaged in arson for profit. He planned and participated in every robbery, organized the sale of the stolen drugs, and arranged every arson in which the group engaged. Turkette was the principal defendant instead of the government's star witness, and he entreated this Court to determine the boundary between RICO liability as a continuing pattern of racketerring activity and single, isolated conduct not constituting enterprise membership.

The extension of RICO to encompass the application of multiple acts in a single episode is not within a reasonable interpretation of the statute.

In Kotteakos v. United States, 328 U.S. 750 (1946) the indictment charged a single conspiracy, but the government proved multiple conspiracies in a multi-defendant, complex case. This Court reversed, finding prejudicial error under the facts of the case. In Martino, supra,

the appellants contended that the indictment charged a single conspiracy, but that the government proved multiple conspiracies in a multi-defendant complex case. The Martino court at p. 8244 dismissed this contention by finding no variance affecting the appellants' substantial rights.

In Martino, supra., the court was faced with a case which was factually indistinguishable from Kotteakos, supra. There Simon Brown, who secured FHA home improvement loans for customers of his construction business, decided that brokering such loans could become profitable. He created and operated an "enterprise" specializing in obtaining fraudulent FHA loans, fraudulent in that they were not used for purposes required by law and as stated in the applications themselves. Brown was assisted in operating this enterprise by employees and others who located applicants, assisted in preparing false documents, and performed various other tasks. For his services, Brown charged 5% of each loan, handling over 100 before he was caught.

Conspiracy to violate the National Housing Act was charged against 32 persons, mostly borrowers. Brown pleaded guilty and testified against 19 former customers in a joint trial. Kotteakos and Regenbogen had been introduced by Lekacos to Brown, who obtained four loans for them. They had had no connection with any other defendant or transaction, or with Brown or his organization, apart from those loans. The Court of Appeals disagreed with the government's attempt to justify charging them as having been "all parties to the enterprise". 151 F.2d at 170. However, the Court thought the error harmless, since the jury must have found that each defendant conspired separately with Brown in order to find them members of the conspiracy

charged. The Supreme Court reversed, holding that the error could not be considered harmless where so many unrelated undertakings, in which the only common purpose was that of Brown to broker as many fraudulent loans as he could, were brought together for common trial.

In Martino, supra., Noriega, like Brown, operated[7] an enterprise. Like Brown, he was regularly assisted by a few confederates. Like Brown, he dealt mainly with individuals who, except for a single transaction, or episode had no connection with him, his enterprise, his confederates, or any similar transaction. Like Brown, he testified against them all in a mass trial.

The Martino court set down a rigid rule against which to measure the prejudicial variance claim. "If the government proves multiple conspiracies and a defendant's involvement in at least one of them," then there is no variance affecting the Defendant's substantial rights. Such a rule is a repudiation of the rule announced in Kotteakos, supra., and of that announced in Berger v. United States, 295 U.S. 78 (1935).

In Berger, supra., the Defendants were charged with one conspiracy, but the government's evidence established two. The Berger court accepted jurisdiction in the case to determine whether such a variance was per se fatal.

It is clear that from Berger, that proof of multiple conspiracies under a single conspiracy count is neither a per se harmful variance nor per se harmless variance. A reviewing court must look to the underlying facts. The Martino court refused to look at the underlying facts, but chose instead to generate a per se harmless variance rule.

Assuming that Mr. Young had contact with the enterprise, it certainly was as remote as it was fleeting, the sole testimony against him being that of Willie "The Torch" Noriega. Indeed, save for Noriega's tainted soliloquy no testimony adverse to Young was elicited from any of the government's witnesses. For Robert D. Young did not own the Armenia property. He merely arranged for its insurance coverage through Arthur I. Yanoff & Company a brokerage firm. As such, he didn't even select the insurors. Had he done so, then he could have selected one that utilized the services of adjustor (and conspirator) Joseph Carter.

Mail fraud Count 32 charges Young with "causing" a certain correspondence to be mailed by Arthur I. Yanoff & Company to a New York insurance company in furtherance of the "scheme". But Young did not "cause" any such thing. He merely provided policy coverage for a client, co-petitioner John Fisher. In no way does the evidence indicate Young requested or insisted that Arthur I. Yanoff & Company be engaged in any activity touching upon fraudulent use of the mails.

Finally reference count 33, the Proof of Loss Statement was prepared and mailed by co-petitioner John Fisher with the help of his attorney. Mr. Young in no way was involved with its preparation and filing.

So, in retrospect, Robert Young at worst was peripheral figure in this cause. He was, as eloquently stated at sentencing, "lost in the shuffle". He was convicted, in brief, for having secured insurance coverage for a good client and friend.

Finally, the government's indictment (p. 5) stated

"It was further a part of the conspiracy that, among other things, Joseph Carter, a/k/a "Joe" would direct members of the Enterprise to particular insurance agencies for the purpose of acquiring fire insurance coverage on property intended for burning in order to increase Carter's chance of being assigned future property adjustments arising from the Enterprise's arson activities."

The Armenia fire of April 13, 1976 allegedly involving insurance representative Young, was the last in chronological time alleged in the conspiracy. The evidence at trial clearly showed that "Willie the Torch" Noriega was known or otherwise suspected to be involved in arson activities long before this last fire.

Therefore, as a knowledgeable insurance representative, why would Young associate with the highly suspect Noriega at so late a date in the affairs of the so-called enterprise? Were this so, why were his services not utilized by the enterprise long prior to this final fire? For, if the RICO conspiracy truly is applicable to Young, then he should have been a major conspirator in the enterprise rather than a minor, peripheral figure involved in but one fire and the last one at that.

Under the Kotteakos decision, it is clear that in the multi-defendant complex criminal case, a variance between allegation and proof is not to be dismissed under a per se non-judicial rule. The Martino court's attempt to do so should be specifically addressed and put to rest by this Court.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully requests an order granting the Petition for Writ of Certiorari so that this Court may answer the important questions set out above and

eliminate the conflict in decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to co-counsel, Solicitor General, and Sara Criscitelli, by U. S. Mail on this 4th day of December, 1981.